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No. 250

In the Supreme Court of the United States

OCTOBER TERM, 1963

CARL BRANDENFELS, PETITIONER

v.

J. EDWARD DAY, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

FRANK J. DELANY
1317 F. Street, N.W.
Washington D. C. 20004
Attorney for Petitioner

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RESPONDENT'S BRIEF IS MERELY A RESTATEMENT OF THE OPINION BELOW

Respondent's brief opposing the petition for certiorari has a familiar ring. Its Statement and Argument merely restate excerpts from the opinion below in the order there appearing, and largely in the exact language used, although without benefit of quotation marks.

It naturally follows that respondent ignores the questions presented by the petition for certiorari, the errors of the court below, and the misstatement of the record in the opinion of the court below.

Worse than that, respondent's brief repeats crucial misstatements in the opinion below, and like that opinion, omits material indisputable facts of record.

MATERIAL MISSTATEMENTS AND OMISSIONS OF RESPONDENT

Respondent falsely attributes the order dismissing without prejudice to "recognition that the Initial Decision had been prepared by the agency officer who had prosecuted the charges against petitioner . . .", who thereby committed a "procedural error (which) precluded the issuance of a valid fraud order." (Resp. Br. 3) Far from an attempted correction of such error, the dismissal without prejudice repeated it. "Complainant's real reason for seeking to avoid a decision on the merits was the realization . . . that (petitioner) must prevail." (JA 16) The order dismissing without prejudice, like the Initial Decision, was in substance secretly made by the "agency officer who had prosecuted the charges against petitioner. . ."[1] His repetition of the error was no correction of it.

The real reason, ignored by respondent as well as the court below, is indisputable. "The order of dismissal was entered to avoid giving (petitioner) a full and fair hearing on the merits, and with a recognition by the com-

[1] "On or about March 18, 1958, an order was entered dismissing the complaint against petitioner without prejudice, in accordance with complainant's motion for such dismissal. Said order of dismissal was signed by E. O. Sessions, Deputy Postmaster General acting under authority delegated to him by Defendant Summerfield and in turn redelegated by him by the General Counsel, except as to cases referred back by the General Counsel. This written order was signed by E. O. Sessions under circumstances identical to those under which Mr. Hook had signed the Initial Decision. Said E. O. Sessions, an engineer, like Mr. Hook, had not the capacity to understand or pass upon the questions decided by his order. The order was prepared and secretly supplied to him for execution, without knowledge or approval by petitioner, by the same William O'Brien who had prosecuted the case against petitioner. In executing said order, Sessions made no enquiry into the evidence, the record or the law, but instead relied entirely upon O'Brien for the propriety of the order he executed." (JA 17, 18)

plainant that (petitioner) would prevail if granted such a hearing." (JA 18).

Some seven months before the agreed order was entered, petitioner had filed a petition to modify the dismissal so as to be *with* prejudice, which included as a ground, inter alia, that it was in substance and fact made and entered by petitioner's prosecutor. (JA 19). Respondents ignore that petition, instead treating the review that followed as if due solely to an informal agreement between petitioner and the newly appointed Judicial Officer, by some curious process binding petitioner to accept whatever he thereafter did.

Respondents state only a half-truth.

The agreement was between petitioner and his adversary, the General Counsel, concurred in by the Judicial Officer. It provided for a full and fair determination of the merits of the charges against petitioner, and resulted in the agreed order, entered on the petition pending before the Judicial Officer, for his review of the record. His subsequent review was not, as respondents implies, pursuant to a submission to the Judicial Officer in the nature of informal arbitration, outside the scope of the formal proceedings involved. (Pet. 15-17).

Thus the circumstances surrounding the order were entirely regular, and afford no basis for any consent by petitioners to be bound by the following sham determination of the merits.

Equally misleading is petitioner's reference to the order as "highly advantageous to petitioner, who stood to gain . . . and could lose nothing" because the order was not so broad as to permit a fraud order to issue. (Resp. Br. 7).

The order was advantageous to petitioner only in the sense that like the dismissal without prejudice, and like

a default judgment, it represented recognition by petitioner's adversary that the record required respondent be acquitted of the charges of fraud, fairly determined. It was that adversary, *not* petitioner, who (respondent) asserts) "consented to this method of disposition, and quite understandably did not press for the kind of adjudication on the merits which might have resulted in the issuance of a fraud order . . ." (Resp. Br. 7; Pet. 17-20)

Consent by petitioner could be given only to a waiver of *his* rights. Petitioner's adversary could have reopened the entire case and it was the adversary's consent which resulted in limiting the relief the *adversary* might obtain. All this time, the Post Office Department apparently believed that a dismissal without prejudice, unlike a fraud order, was not subject to judicial review (Pet. 5, 19); were that belief correct, the order would have been pro tanto advantageous to petitioner's adversary.

Respondents perversely argue, as the court below ruled, that the failure of petitioner's adversary to seek a fraud order deprived petitioner of the right to question the sham determination which followed; in brief, that a failure of one party to seek a judgment in his favor, (as by a plea of nolle contendere) licenses the judicial tribunal to deny relief to his adversary.

Not even the Post Office Department took any such view. The Judicial Officer instead finally rested his action on the arbitrary "unrestricted . . . authority to dismiss without prejudice when no final agency decision on the merits has been rendered." (JA 57, Pet. 5)

RESPONDENT'S LEGAL ARGUMENTS ARE ERRONEOUS

Respondent argues that "The Post Office Department, in terminating its procedure against petitioner . . . imposed (no) sanction against him." (Resp. Br. p. 6)

Respondents here come most closely to the real questions in the case by contending that a dismissal without prejudice being no "sanction", petitioner has not been hurt, and therefore cannot be heard.

Respondent overlooks the harm to petitioner through added expense and diminished income from the refusal to decide fairly the issues on which he would have prevailed.

Moreover, such a denial is in law as well as fact a sanction. The term "'Sanction' includes the whole or part of any agency. . .withholding of relief. . ." (Section 2(f) Administrative Procedure Act, 5 USCA 1001 (f)), and such sanction is subject to judicial review. (Pet. 13, 14)

Respondents also state that "a decision in the postal proceedings in petitioner's favor would not necessarily preclude further action by the Federal Trade Commission, as these agencies act under different statutes and employ different standards." (Resp. Br. 5, 6, fn. 2) Respondents overlook the doctrine of collateral estoppel, an aspect of res judicata (Partmar Corp. v. Paramount Theatres, Corp. 349 US 89, 1953). The issue of efficacy of petitioner's treatment, which is the basic controversy, would be the crux of the Federal Trade Commission's complaint, just as it was in the Post Office Department. Petitioner seeks no relief except with respect to such common issue.

CONCLUSION

Respondent has avoided the questions presented by the petition, and thereby has lightened the Court's burden by conceding that on the merits respondents have nothing to say. The effect of respondents' brief is to confess error, should certiorari be granted. (Wiener v. U.S. 357 US 349, 350 fn. 1) Grant of the writ and simultaneous summary reversal is now permissible.

For over ten years petitioner pursued his "administrative remedy" in the Post Office Department in a proceeding that was a travesty of law, justice, and honor. The refusal to decide his case there has been matched by refusal of the Court below to consider the merits of the fraud charges against him, at the very time when his adversaries have been instigating a renewal of the same charges by another arm of the United States.

The court below is uniquely charged with review of administrative action and inaction, but denied that review to petitioner for spurious and frivolous reasons. The decision below allows an administrative body unrestricted authority to dismiss without rendering a decision at any stage of the proceedings, even as a way to avoid deciding a case in favor of private citizens. The administrative process thus has become a sardonic jest, as has the theoretical right of judicial review.

For the reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

FRANK J. DELANY
1317 F. Street, N.W.
Washington D. C. 20004
Attorney for Petitioner